Supreme Court U.S.
FILED
05-1479 SEP 2 2006
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

LILIETH A. CLARKE,
Petitioner

v.

JAMES R. NICHOLSON,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Lilieth A. Clarke
137 Woodgate Road
Pittsburgh, Pennsylvania 15235
Telephone: (412) 242-2732

QUESTIONS PRESENTED FOR REVIEW

In the District Court of Western Pennsylvania there is overwhelming evidence and documentation that will support review to determine why Civil Action 01-0111 (CA 01-0111) should not be dismissed. Petitioner presents the following questions for review by this Honorable Court:

Is there substantial evidence found to demonstrate that Petitioner took significant responsibility to secure, report, and maintain counsel, in order to prosecute CA 01-0111 in a timely manner, given hardship Petitioner encountered, also lacking the legal expertise needed to prosecute the Civil Action herself?

Did the Honorable District Court Judge overlook Petitioner's consistent efforts to secure counsel, overcome severe financial hardship to retain counsel, also Petitioner's persistent efforts to keep the Court informed, thereby, not permitting Petitioner a hearing before his decision to dismiss Civil Action 01-0111?

Does documentation in CA 01-0111 reveal that Petitioner was harassed, coerced, and intimidated by Respondent to submit to depositions with prejudice that evoked fear in Petitioner to be deposed within the absence of counsel representing her best interests?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT	1
OPINIONS AND ORDERS BELOW	1
BASIS FOR JURISDICTION	1
INTRODUCTION	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	5
THE THIRD CIRCUIT COURT WAS WRONG IN UPHOLDING THE TRIAL JUDGE'S DECISION TO DISMISS CIVIL ACTION 01-0111 WITHOUT GIVING PETITIONER AS MUCH AS A HEARING TO PRESENT EVIDENCE REGARDING THE POULIS FACTORS	5
CONCLUSION	10

PETITION FOR WRIT

Lilieth A. Clarke, Petitioner, 137 Woodgate Road, Pittsburgh, Pennsylvania, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Third Circuit Court of Appeals is reported at 153 Fed. Appx. 69 (2005), October 17, 2005. Recommendation was denied on December 20, 2005. The Third Court upheld the decision of the Federal Court for the Western District of Pennsylvania, issued October 20, 2004.

BASIS FOR JURISDICTION

The Supreme Court of the United States has jurisdiction over this Case pursuant to Title 28, U.S.C. A. Section 1254 and Rule 13 of the Rules of the Supreme Court of the United States.

INTRODUCTION

Petitioner and Counsel of Record filed Civil Action (C.A. 01-0111) against Respondent in the District Court of Western Pennsylvania on January 16, 2001. Subsequently, Civil Action (C.A. 01-1079) was filed on June 14, 2002.

On November 10, 2002, both Civil Actions were consolidated at C.A. 01-0111, under suggestion of the District Court of Western Pennsylvania and consideration by the Petitioner and Counsel of Record.

STATEMENT OF THE CASE

In the consolidated Case, C.A. 01-0111, Petitioner alleged discrimination (bases of race, national origin, ethnicity, age, disabilities to perform work;), several reprisals, demotions, subsequent retaliations substantial enough to cause physical injuries, prolonged severe emotional and mental distress, continuous humiliation, defamation of character, citations of incompetence to harm personal and professional integrity, loss of income and medical coverage to access health care during illness and recovery, unfair Proficiency Rating, continuous denial of training and education, failure to promote x 4, and subsequently, abrupt and wrongful separation from employment with Federal

Government Healthcare Administration, Veterans Affairs Pittsburgh Healthcare System, since January 26, 1999.

Petitioner encountered severe hostile work environment with disparate treatment compared to other peers for the duration of time from April 1995, to the time of separation on January 26, 1999.

Petitioner experienced sexual (unwelcome verbal and gender) harassment by approving level supervisor during the period July, 1995, to approximately March, 1997. Petitioner suffered physical, mental, and emotional injuries that required surgical and medical interventions. These injuries were secondary to withholding of resources to perform required duties, along with poor workplace conditions not conducive to getting the job done.

Petitioner did not receive her last pay check after abrupt separation from employment because of Respondent's failure to follow proper administrative procedures when dealing with employee separation issues on January 26, 1999. Petitioner received that pay check on January, 2000, (one year later) with the help of the FBI's Office placing a call to Respondent's legal counsel's office. Title 38 Union Representatives had to intervene to assist Petitioner to preserve due process, civil rights, address mistreatment, and defend reasonable time frames in which to subject Petitioner to displacement in somewhat of a dignified manner.

December 1999, Petitioner was faced with pending denial for renewal of her Registered Professional Nurse License for the State of Delaware because Veterans Affairs Pittsburgh Healthcare System (VAPHS) failed to provide required documentation on the Renewal Reference Form regarding whether or not they would rehire her, and whether or not her professional nursing practice met required standards.

Petitioner is experiencing post traumatic distress (PTSD), non-functioning of distal joints right and left little fingers, impaired function of both wrists, and other episodic illness (past, present and anticipated future), secondary to the workplace traumatic conditions endured.

Petitioner sought remedy to be made **whole**. Remedy included and was not limited to recovery of compensatory and punitive damages, rights to back-pay and front-pay, reimbursement of all legal fees, retraining and continuing education, compensation for past, present and future damages associated with conditions cited above, and reemployment rights.

Petitioner adopted a lifestyle that would enable her to preserve good health, withstand unusual financial burden, also to be able to endure the long lonely legal journey that ensued from 1995 to present trial era, with integrity and sustained credibility. Petitioner became astranged from family members because she wanted to protect them from worrying about the difficulties she was experiencing. By preponderance of evidence, Petitioner will be able to support the significance of the astrangement referred above, to include depravation of enjoyment.

The most difficult challenges for Petitioner to prosecute Civil Action 01-0111 and successfully complete depositions were as follows:

> Petitioner struggled to secure counsel committed to support her best interests, thereby, prosecuting the case and conducting discovery proceedings.
>
> Petitioner could not carry the financial burden ascribed, thereby, persuasively advance with retaining counsel. The difficulty was compounded with the fact that the case had advanced into proceedings toward trial, and lacking opportunity to conduct other methods for discovery.
>
> Respondent's counsel treated Petitioner with harshness (loud talk), intimidation, and coercion in attempts to depose. For these reasons, lack of legal representation to object to and to sustain good faith for Petitioner during deposition, completion of deposition was difficulty to achieve.

REASON FOR GRANTING THE WRIT

THE THIRD CIRCUIT COURT WAS WRONG IN UPHOLDING THE TRIAL JUDGE'S DECISION TO DISMISS CIVIL ACTION 01-0111 WITHOUT GIVING PETITIONER AS MUCH AS A HEARING TO PRESENT EVIDENCE REGARDING THE POULIS FACTOR.

In the review for writ, strong evidence showing that a lot of the work in C.A. 01-0111 was achieved and completed by Petitioner will be found. Petitioner labored intensively with careful insight to meet time lines.

Two counsels of record withdrew representation during trial proceedings, with prejudice and disloyalty to Petitioner. Petitioner received bad advice from counsels who were granted orders to withdraw their representation during trial proceedings (Bad Faith).

Petitioner was totally demeaned in a District Court mediation held on March 28,2004, that was presumable meant to place both parties issues of concern on the table and amicably achieve resolution. Rather, in the mediation it was alleged that Petitioner was living in rage while holding Respondent hostage. Resolutions were proposed and dictated versus discussed. Options presented to Petitioner were undisclosed monetary award, returning to where Petitioner came from, totally resigning from Federal Government Healthcare employment, and volunteering services at soup kitchen; etc. In whatever context such information was intended, the delivery and content were awfully negative representation of court justice, and degradating to Petitioner. Symbolically, counsels sat back without intervening and allowed Petitioner to respond solely with her back up against a wall. A second attempt to mediate on April 24, 2004, proved to go no where mediation was meant to go.

Petitioner felt undoubtedly betrayed by counsel. This allegation regarding counsel coming from Petitioner was not denied, refuted, nor evoked discussion when made public to counsel.

The Honorable Trial Judge granted Petitioner extensions to secure counsel, however, did not give Petitioner the opportunity for a hearing to present evidence of efforts made to secure new counsel before granting order to dismiss CA 01-0111.

The Trial Judge and counsel of record allowed Jury award money entitlement for Petitioner in C. A. 98-1601, dated January 25, 2001, to be paid into the District Court financial department until release on March, 2005. Six attempts by Petitioner to collect the money were unsuccessful. Petitioner made a long and largely unsuccessful effort to obtain the money and pay counsel who filed a motion for distribution. Petitioner was denied any portion of interest accrued on the money.

To advance proceedings in C.A. 01-0111 timely, Petitioner filed her Pretrial Statement on October 20, 2003. Petitioner had to file a motion to compel Respondent to file their Pretrial Statement due on July 27, 2004. Respondent received enlargement of time to file Pretrial Statement, however, took nine months to accomplish Court Order to file their Pretrial Statement.

Petitioner exhausted the Greater Pittsburgh yellow pages along with telephone calls made to secure counsel. Petitioner travelled downtown Pittsburgh and untiringly knocked on any door with a sign Attorney

At Law to get help. Petitioner obtained names and called telephone numbers of Attorneys listed in the Homer Brown Law Association Handbook without success.

Petitioner sought help from Pittsburgh Urban League, University of Pittsburgh Law School, NAACP, and Blacks In Government Association Headquarters, Washington, D.C. Some recommended interventions were applied, however, without concrete commitment to advance Case toward prosecution and implementation of methods to depose and compile discovery.

Petitioner went out of PA to New York, Maryland, and Florida to secure counsel. The difficulty experienced was again related to facts that the Case had advanced into trial proceedings, and lacking opportunity to conduct other methods for discovery with concerns to meet stipulated time lines.

On October 20, 2004, the trial Judge dismissed CA 01-0111 over Petitioner's objection as a sanction and without hearing for failing to submit to further deposition without counsel, and for failing to proceed with prosecution of CA 01-0111.

While the District Court Honorable Judge noted that Petitioner did not state a deliberate objection to the entry of an Order allowing counsel to withdraw representation, no attention was given to the fact that the Court Order was entered without hearing two days after the motion to withdraw was filed.

The Honorable Judge did overlook the fact that Petitioner did note in motion for Order to continue to seek and secure new counsel, that Petitioner would like to continue with counsel of record, however, Petitioner could not persuade counsel to continue representation. Petitioner felt counsel's action was prejudicial, also loyalty was betrayed.

In summary, Petitioner presents to this Honorable Court that:

the Honorable Judge abused the discretion of dis missing CA 01-0111 by not allowing Petitioner to present evidence of significant steps taken to secure counsel and to advance prosecution and discovery in CA 01-0111;

the Third Circuit Court was wrong in upholding the trial Judge's decision to dismiss CA 01-0111. It is evident that the Honorable Judge gave no significance to the fact that while unstable financial conditions existed, made monetary sanctions an unlikely remedy. The Judge knew that there was over $200,000.00 available in a court controlled bank account accruing interest and belonging to Petitioner who was having much difficulty in having the money released to her. Petitioner was denied any or all portions of interest accrued on the money from the bank.

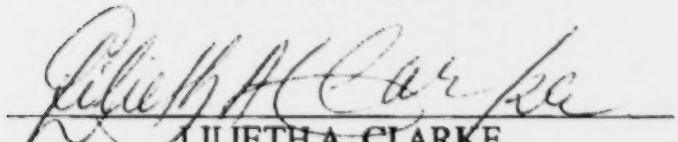
Petitioner requests that this Honorable Court see it prudent to reexamine the decision to dismiss CA 01-0111, and find that the District Court abused it's discretion putting Petitioner out of Court without as much as a

hearing, at which time she could have a chance to present evidence regarding the Poulis factors, thereby, obtaining the opportunity for argument before the appropriate Honorable Court. Petitioner is crying out to this Honorable Court to use wisdom, knowledge, understanding, discernment, and justice to help our people. Romans 8: 28-39, speaks to God's prophecy to Paul to deliver His people, those God predestined for His purpose. The Most Sovereign God Almighty, Judge of all Heaven and Earth is asking this Honorable Court to hear the petitions and pleadings of His Servant who is oppressed, abused, rejected, and afflicted because of race, color, and creed. Petitioner's focus of appeal to the Supreme Court of the United States comes from Romans 8:vs. 33-35.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,



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For The Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

APPENDIX A:: Opinion of United States District Court For The Western District Of Pennsylvania in Clarke v. Nicholson, MEMORANDUM AND ORDER, Civil Action 01-0111, October 20, 2004. App. 1

APPENDIX B: ORDER Of U.S. District Court For The Western District Of Pennsylvania in Clarke v. Nicholson, October 20, 2004. App. 7

APPENDIX C: OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, No. 04-4432, Clarke v. Nicholson, October 17, 2005. App. 8

APPENDIX D: JUDGMENT Of U.S. Court Of Appeals For The Third Circuit, October 17, 2005. App. 16

APPENDIX E: ORDER AMENDING OPINION In The UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT COURT, No. 04-4432, November 2, 2005. App. 18

APPENDIX F: SUR PETITION FOR PANEL REHEARING AND JUDGMENT In The UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, Clarke v. Nicholson. App 20

APPENDIX G: ORDER Of U.S. Court Of Appeals On SUR Petition For Rehearing, December 20, 2005. App.21

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LILIETH A. CLARKE Plaintiff,	)	
V.	)	Civil Action No. 01-0111
ANTHONY J. PRINCIPI, Secretary Of The Department Of Veterans Affairs, Defendant	)	

MEMORANDUM AND ORDER

Gary L. Lancaster,
District Judge. October 20, 2004

This is an action in employment discrimination. Plaintiff alleges that she was discriminated against multiple times during the course of her employment with the Department of Veterans Affairs ("VA"). Now pending before the court is defendant's motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 41 (b).

For the reasons set forth below, defendant's motion will be granted.

I. BACKGROUND

Unless otherwise specifically indicated, the

following facts are undisputed. Plaintiff filed the instant complaint with this court on January 16, 2001. In the complaint, she averred that officials at the VA hospital where she worked had racially discriminated against her and then retaliated against her for reporting the discriminatory conduct.

On June 14, 2004, the court granted plaintiff's attorney's motion to withdraw as counsel and simultaneously granted plaintiff 45 days to secure new counsel. On July 30, 2002, after the 45 days had passed, the court granted plaintiff's motion to postpone all proceedings until she could retain new counsel, allowing her an additional two months (until September 30, 2002) to hire an attorney. On October 1, 2002, the court granted plaintiff's second motion for an extension of time (until October 31, 2002) to secure new counsel. On January 30, 2003, the court granted another motion for continuance filed by plaintiff, giving plaintiff until March 31, 2003, to secure new counsel. Again, on July 2, 2003, the court granted a motion for continuance filed by plaintiff, giving her additional time (90 days) to file her pretrial narrative statement and to secure counsel.

On November 14, 2003, defendant filed a motion to take plaintiff's deposition out-of-time. That motion was granted on march 31, 2004. Defendant noticed plaintiff's deposition for April 22, 2004, at 9:30 A.M. On April 20, 2004, plaintiff informed defendant that she was unable to attend depositions on weekdays due to work conflicts. On April 22, 2004, she faxed defendant an unfiled motion, requesting her deposition be postponed until after May14, 2004, so that she could secure counsel. Defendant agreed

to plaintiff's request, and asked her for a list of possible dates for her deposition. Plaintiff failed to provide the requested information to defendant. On April 30, 2004, Defendant noticed plaintiff's deposition on May 24, 2004, at 9:30 A.M. Defendant simultaneously filed a motion to compel enforcement of the of the notice of deposition.

On May 24, 2004, the date of the scheduled deposition, an attorney named Lisa Lyons Ward faxed a letter to defendant's counsel, requesting that plaintiff's deposition be postponed for one week so that Ms. Lyons could enter her appearance. Ms. Lyons never entered an appearance on plaintiff's behalf. On May 24, 2004, plaintiff arrived approximately 45 minutes after the scheduled start time for the deposition at defendant's counsel's office. She did not have an attorney with her. Plaintiff refused to answer any substance questions during the deposition.

On June 4, 2004, defendant filed a second motion to compel the enforcement of notice of deposition to plaintiff. On July 2, 2004, the court granted defendant's motion to compel and ordered that the deposition take place by July 30, 2004. Five days later, defendant noticed plaintiff's deposition (via certified letter) for July 21, 2004, at 9:30 A.M. Plaintiff did not appear for the scheduled deposition, nor did she attempt to cancel or postpone it.

II. DISCUSSION

In Poulis v. State Farm Fire and Casualty Co., 747 F. 2d 863 (3d Cir. 1984), the court of appeals established guidelines to determine whether to dismiss an action for a litigant's failure to prosecute. Accordingly, the court

must take into consideration: 1) The extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to comply with scheduling orders and to respond to recovery; 3) the history of delay; 4) whether the conduct of the party or the attorney was willful or in bad faith; 5) the availability and effectiveness of alternative sanctions; and, 6) the merit of the claim or defence. Id. at 868. With the foregoing factors in mind, the court turns to the circumstances of this case.

1) The extent of the party's personal responsibility

This clearly is not a case where a party's rights are being sacrificed because her attorney is in contempt of a court order. Plaintiff is acting pro se and is directly responsible for the consequences of any action or inaction taken by her in this litigation. As such, she is fully and completely responsible for failing to prosecute her claim.

2) Prejudice to the adversary.

Because plaintiff seeks damages from defendant, if plaintiff never prosecute the case, the defendant indirectly prevails. Yet, defendant, like all parties, has a greater interest in having litigation brought to an end. Defendant is prejudiced by the uncertainty, expense and inconvenience that are inherent when a case such as this extends indefinitely. Furthermore, defendant here has certainly suffered prejudice by virtue of plaintiff's continued refusal to be deposed.

3) A history of dilatoriness.

We fail to see where plaintiff has taken any substantial action to prosecute this case. She filed the complaint in this case nearly four years ago, and due to her unwillingness to secure counsel and to be deposed in accordance with the court's multiple orders, the case has remained virtually stagnant since 2001. Time after time, plaintiff has failed to obtain counsel and refused to allow defendant to depose her. She is certainly within her rights to proceed pro se, but she may not flagrantly disregard the court's orders, which only came after many liberal continuances had been granted. Simply put, plaintiff has engaged in a pattern of behavior that has unduly delayed these proceedings, and her behavior, indicating a total unwillingness to take part in prosecuting the case that she brought before this court, cannot be permitted to go on infinitum.

4) Whether plaintiff's conduct was willful or in bad faith

Plaintiff's failure to respond to the court's most recent order compelling her to appear for deposition, taken in conjunction with her failure to retain new counsel, leads the court only to the conclusion that her conduct was willful and or in bad faith. This is a savvy plaintiff. She was successfully involved in prior litigation with a VA as well as EEO proceedings, and she holds a masters degree.

5) Alternative sanctions.

Generally, the most effective sanction that can be levied against a party or his attorney is the imposition of the

cost incurred by the adversary. However, because plaintiff is proceeding pro se and has ignored virtually all of my prior orders, the threat of monetary sanctions that she would actually pay is, as practical matter, nonexistent. Additionally, because plaintiff is not an attorney, the court is unable to impose disciplinary action against plaintiff. Thus, the court finds that no effective alternative sanctions can be imposed on plaintiff.

6) Merits of the claim.

Upon review of the substantive record as a whole, limited as it may be, the court concludes that plaintiff's claim is not frivolous.

III. CONCLUSION

Upon consideration of all the above factors, the court finds that they weigh in favor of dismissing the complaint. Thus, the complaint will be dismissed for plaintiff's failure to prosecute. The appropriate order follows.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LILIETH A. CLARKE Plaintiff	)	
v.	)	Civil Action No. 01-0111 October 20, 2004
ANTHONY J. PRINCIPI, Secretary of the Department of Veterans Affairs, Defendant	)	

ORDER

AND NOW, this 20th day of October, 2004, IT IS HEREBY ORDERED that this action is DISMISSED. The Clerk of Court is directed to mark the case closed.

BY THE COURT:

/S/ Gary L. Lancaster, J.
District Judge

c.c. All Counsel of Record

APPENDIX C NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4432

LILIETH A. CLARKE
Appellant
v.

*JAMES R. RICHARDSON,
Secretary Of Veterans Affairs, United States
Veterans Administration

*(Substituted pursuant to F.R.A.P. 43(c))

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF PA
(D.C. No.: 01-cv-0111)
District Judge: The Honorable Gary L. Lancaster

Submitted pursuant to LAR 34. (a)
on September 26, 2005
Before: RENDELL, FUENTES, and GARTH
Circuit Judges
(Filed: October 17, 2005)

OPINION OF THE COURT

Fuentes, Circuit Judge.

The Appellant, Lilieth A. Clarke ("Clarke"), filed two complaints against her former employer, the United States Veterans Administration (the "Veterans Administration") alleging employment discrimination. The two cases were eventually consolidated. On or about June 12, 2002, Clarke's counsel withdrew from the cases. Clarke repeatedly asked, and was granted, additional time to obtain new counsel, but failed to obtain new counsel for approximately two years. After Clark failed to appear for her deposition in violation of the District Court's Order of July 2, 2004, the District Court granted the Veterans Administration's Motion to Dismiss Pursuant to Rule 41(b), and dismissed the action in its entirety.

1.

Because we write only for the parties, we recite only the essential facts. Clarke, a nurse of African-Caribbean Origin, was an employee of the Veterans Administration from 1981 until 1999. In 1998, Clarke filed an employment discrimination suit against the Veterans Administration. In July 1999, Clarke's Counsel withdrew from the representation. Clarke proceeded pro se, and retained new counsel in November 2000, two months before trial. On January 25, 2001, after a trial, a Jury returned a verdict in Clarke's favor and awarded her $250,000.

Clarke, through her new counsel, filed two additional complaints against the Veterans Administration on January 16, 2001, and June 14, 2001, alleging employment discrimination and retaliation. The District Court consolidated the two cases on November 20, 2004.

On June 14, 2002, The court permitted Clarke's counsel to withdraw from the cases. Clarke did not object. The District Court allowed Clarke until July 29, 2002, to have new counsel enter an appearance, or else the District Court would consider her as proceeding pro se. (Order dated June 14, 2002, Appelant's Appendix at 38a). On July 25, 2002, Clarke moved for an additional 60 days to secure new counsel. The District Court granted the motion, and allowed her until September 30, 2002, to retain counsel. (Order dated July 30, 2002, Appellant's Appendix at 60a.). On or about September 27, 2002, Clarke requested an additional 30 days to retain counsel. The District Court granted the motion, and allowed her until October 31, 2002, to retain counsel. (Order dated October 1, 2002, Appellant's Appendix at 66a.). Clarke did not request additional time until January 21, 2003, when she requested two additional months to retain counsel. The District Court granted the motion, and allowed Clarke until March 31, 2003, to retain counsel. (Order dated Feb, 3, 2002, Appellant's Appendix at 55a.). On January 27, 2003, The District Court issued an Order stating that discovery in the case would close on May 16, 2003, and setting due dates for Pretrial statements in June. (Order dated January 27, 2003 Appellant's Appendix at 74a.).

When Clarke could not meet the deadlines for retaining counsel and submitting a pretrial statement, the District Court provided Clarke with a delinquency notice and extended the deadline. On June 30, 2003, Clarke, unable to meet the new dead line, requested an additional 30 days to retain new counsel and file her pretrial statement. The District Court granted Clarke an additional 90 days, allowing her until September 30, 2003, to retain counsel, and explicitly stated that no further extension would be granted. (Order

dated July 2, 2002, Appellant's Appendix at 96a.). The District Court extended the deadlines for filing of Clarke's and the Veterans Administration's pre-trial statements to October 20, 2003, and December 1, 2003, respectively. (Id.).On October 20, 2003, Clarke filed her pretrial statement, in which she indictated that she had been unable to attain counsel.

On March 30, 2004, The District Court granted the Veterans Administration's motion for permission to take Clarke's deposition out of time, allowing the Veterans Administration until April30, 2004, to take Clarke's deposition. (Order dated March 30, 2004, Appellant's Appendix at 88a.). On April 15, 2004, the Veterans Administration noticed Clarke's deposition for April 22, 2004. (Appellant's Appendix at 113a.). Clarke informed the Veterans Administration that she was unable to be deposed at that time, and gave the Veterans Administration her work hours to schedule a different time. The Veterans Administration sent her a second notice of deposition on April 21, 2004, scheduling the deposition for April 28, 2004. (Id. at 112a.). On April 22, 2004, Clarke faxed the Veterans Administration a motion requesting that the District Court defer her deposition until 1:00 P.M on May 14, 2004. (Id. at 118a.) Upon receiving the fax, the Veterans Administration agreed to the postponement, and requested that Clarke provide the Veterans Administration with a list of potential dates and times. (Id. at 130a, 135a, 139a.). On the morning of May24, 2004, Clarke spoke with an administrative assistant to the Veterans Administration's counsel. Clarke informed the assistant that she had retained counsel, that Clarke's new counsel would contact the Veterans Administration to arrange a date to reschedule Clarke's deposition, bur that Clarke would appear for the deposition that day,

although possible later than the scheduled time. The Veterans Administration received a fax later that morning from Lisa Lyons Ward, Esq. ("Ward") representing that Clarke had retained her as counsel and requesting that the Veterans Administration reschedule the deposition for next week. The Veterans Administration was unable to contact either Clarke or Ward by phone, and Ward had not entered an appearance as Clarke's counsel. Clarke arrived for deposition without an attorney and requesting a postponement, and the Veterans Administration refused to reschedule. Clarke refused to answer any substantive questions.

On June 4, 2004, the Veterans Administration filed its second motion to compel Clarke's appearance at her deposition noticed for June 15, 2004. (Id.at166a.). The June 15, 2004 deposition did not take place. Although Ward had not entered an appearance, the Veterans Administration attempted to contact her to schedule a deposition, with no success.

On July 2, 2004, the District Court granted the Veterans Administration's motion to compel, ordering Clarke to appear no later than July 30, 2004 for deposition. (Id. at 186a.). The Veterans Administration sent out a notice of deposition scheduling Clarke's deposition for July21, 2004. (Id. at 206a.). Clarke did not appear for deposition on that date. At no time has Ward entered a notice of appearance.

On July 23, 2004, the Veterans Administration moved to dismiss Clarke's action for failure to prosecute. (Id. at 226a.). Following Clarke's response pleading, the District Court granted the motion and dismissed the action. (Memorandum and Order of October 20, 2004, Appellant's Appen-

dix at 1a.). Clarke timely appealed.

II.

This Court reviews a district court's ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 41(b) for abuse of discretion. See Adams v. Trustess of the New Jersey Brewery Employees' Pension Trust Fund, 29 F. "only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used.." Evans v. Buchanan, 555 F.2d. 373 (3d Cir. 1977).

In Poulis v. State Farm Fire and Casualty Co., 747 F. 2d 853, (3d Cir. 1984), this Court set forth six factors that a district court must consider before dismissing an action for failure to prosecute: 1) the extent of nonmoving party's personal responsibility; 2) the prejudice to the moving party caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal, which entails analysis of alternative sanctions; and 6) the meritoriousness of the claim or the defence.

Here, the District Court's application of these factors was not an abuse of discretion. The District Court considered each factor delineated in Poulis and concluded that dismissal was proper. The District Court noted that, unlike a situation in which a dismissal is predicated upon an attorney's error, the plaintiff here was pro se and directly responsible for her actions and inaction in the litigation. (Order dated October 20, 2004, Appellant's Appendix at 4a.- 5a.). Moreover, although failure to prosecute would result in the defendant

indirectly prevailing, the district court correctly acknowledged that the defendant has an interest in having litigation brought to an end, and was prejudiced by the expense and inconvenience in the plaintiff's continued delay and failure to appear for deposition. (Id. at 5a.) See Ware v. Rodale Press, Inc., 322 F.3d 218, 222-24 (3d. Cir. 2003) (finding prejudice to defendant in plaintiff's delay and failure to comply with requests for discovery). As the District Court noted, the plaintiff had a history of dilatoriness in her failure to take any substantial action, her repeated requests for delays, and refusal, in violation for a court order, to be deposed. (Id. at 5a.-6a.). The District Court's conclusion that the plaintiff was acting willfully or in bad faith was based upon the plaintiff's failure to respond to the court's order compelling her to appear for deposition, her repeated failure to retain new counsel, and the fact that the plaintiff, having recently and successfully brought a similar case, was not unfamiliar with the judicial process involved. Id. at 6a.). Given that the plaintiff would likely be unable pay monetary sanctions, the court concluded that there were no viable alternative sanctions. (Id. at 6a-7a.). Although the plaintiff now argues that the District Court should have used civil or criminal contempt as an alternative sanction, this argument is without merit. Civil contempt is used as a coercive measure, and is not appropriate to coerce a plaintiff into proceeding with case that she voluntarily commenced. Criminal contempt is a punitive sanction that would be inappropriately for failure to prosecute. Finally, although the District Court found that the plaintiff's claim was not frivolous, this consideration does not outweigh the other Poulis factors, which supports the District Court's decision to dismiss the case. Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988) (stating that not all Poulis factors need be met in order for district court

to grant motion to dismiss pursuant to Rule 41(b). In the end, the District Court was more than fair and considerate of Clarke's many scheduling problems.

For the reasons stated in the District Court's well-reasoned and thorough opinion, we find that the motion to dismiss was properly granted. We therefore affirm.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4432

LILIETH A. CLARKE
Appellant

v.

*JAMES R. RICHARDSON
SECRETARY OF VETERANS AFFAIRS,
UNITED STATES VETERANS ADMINISTRATION

*(Submitted pursuant to F.R.A.P. 43(c)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF PA
Civil No. 01-0111

Submitted pursuant to LAR 34.1(a)
on September 26, 2005

Before: RENDELL, FURNTES,
and GARTH, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on September 26, 2005. On consideration thereof, it is now ORDERED and ADJUDGED that the decision of the district court entered on October 20, 2004, is AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron,
Clerk

Dated: October 17, 2005

Certified as a true copy and issued in lieu
of a formal mandate on 12/28/05
/s/ Marcia M. Waldron, Clerk
Teste:
Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

N.04-4432

LILIETH A. CLARKE
Appellant

v.

* JAMES R. NICHOLSON,
SECRETARY OF VETERANS AFFAIRS; UNITED
STATES VETERANS ADMINISTRATION
Appellee

*Submitted Pursuant to F.R.A.P.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. No. 01-cv-0111)

District Judge: The Honorable Gary L. Lancaster

Submitted pursuant to LAR 34.1(a)
on September 26, 2005

Before: RENDELL, FUENTES,
and GARTH. Circuit Judges

APPENDIX E

ORDER AMENDING OPINION

It is ORDERED that the caption in the not precedential opinion and judgment in the above case, filed October 10, 2005, be amended as follows:

James R. Richardson should be changed to James R. Nicholson.

By the Court

/s/ Julio M. Fuentes
Circuit Judge

DATED: November 2, 2005

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4432

LILIETH A CLARKE
Appellant
v.

*JAMES R. RICHARDSON, SECRETARY
OF VETERANS AFFAIRS, UNITED STATES
VETERANS ADMINISTRATION
Appelle

ON APPEAL FROM UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF PA
Civil No. 01-0111

Submitted pursuant to LAR 34.1(a)
on September 26, 2005

SUR PETITION FOR PANEL REHEARING

Present: RENDELL, FUENTES, and GARTH
Circuit Judges

APPENDIX G

The Petition for Rehearing filed by the Appellant in above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Rehearing is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: December 20, 2005
tyw/cc: Thomas A. Crawford Jr., Esq.
Laura S. Irwin, Esq.
Christine A. Sanner, Esq.